No. 12,441

United States
COURT OF APPEALS
for the Ninth Circuit

HUGO V. LOEWI, INC., a Corporation,
Appellant,

v.

KILIAN W. SMITH,
Appellee.

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

Appeal from the United States District Court for the District of Oregon.

KERR & HILL,
ROBERT M. KERR,
STUART W. HILL,
Attorneys for Appellant.

STEVENS-NESS LAW PUB. CO., PORTLAND 2-51

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PETITION FOR REHEARING

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TO THE HONORABLE, THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Comes now Hugo V. Loewi, Inc., a corporation, and respectfully petitions this honorable court for a rehearing in accordance with the rules and practice of this court, on the following grounds:

I. The court erred in deciding that the hops tendered by the appellee were of the quality called for by the contract.

II. The court erred in deciding that the respondent is entitled to maintain this action for the price of the hops under the provisions of Section 64(2) of the Uniform Sales Act, Section 71-164(2), O.C.L.A.

III. The court erred in refusing to apply the measure of damages specified in the contract.

KERR & HILL,
ROBERT M. KERR,
STUART W. HILL,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I, Stuart W. Hill, one of the attorneys of record for the appellant on this appeal, hereby certify that in my opinion the petition for rehearing is well founded and that it is not interposed for delay.

STUART W. HILL,
One of the Attorneys for Appellant.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

ARGUMENT

I.

ISSUE ON QUALITY

The court erred in deciding that the hops tendered by the appellee were of the quality called for by the contract.

The court concluded that the hops tendered did conform to the quality called for by the agreement, for these reasons:

1.

> " * * * both at the time the contract was executed and at the time the 'picking advance' was made appellant through its representative had knowledge of the mildewed condition of the hops."

This statement is correct, as it is assumed that the court is referring to the hops while they were still on the vines. It cannot be emphasized too strongly, of course, that this was a contract of sale of a processed product: hops which were harvested, dried, cured and baled.

The court continued:

> "In regard to the knowledge of appellant at the time the contract was executed the court found:
>
> " 'Before entering into said cluster hop agree-

ment defendant (appellant) inspected said cluster hop crop and defendant knew that said hop crop then showed some mildew and would in normal course show such mildew when picked and baled.'

"Appellant admits that the first part of this finding is true but denies that the second part is supported by any substantial evidence. We do not agree. There is evidence in the record that not all of the hops were picked; that appellee and his pickers made every effort to avoid mildewed hops; and that selective picking of hops is impractical. The finding of the trial judge is in our view supported by substantial evidence."

There is no evidence in this record to support the court's expression that "appellee and his pickers made every effort to avoid mildewed hops." In fact, all the evidence points to the opposite conclusion: they made no reasonable or substantial effort to avoid such hops.

The following statement in the appellant's brief, page 8, was unchallenged by the appellee:

"The plaintiff admittedly made no earnest effort to avoid harvesting mildewed hops. He acknowledged that he harvested and baled all but 25 per cent of the cluster crop (Tr. 133) despite the fact that 50 per cent of the crop was mildewed (Tr. 103). He did not cut down any of the vines of mildewed hops ahead of the pickers in order to avoid the harvesting of those hops (Tr. 134, 135). He simply told his pickers 'to let the worst ones hang,' with the result that the pickers did pick mildewed hops, and 'just skipped those that were real badly infected' (Tr. 134)."

The only comment by the appellee was this, page 16:

"Picking on the clusters began about August 25th and continued until about September 3rd

(S.R. 110). Not only did Mr. Smith instruct his pickers to skip the badly mildewed vines and branches (S.R. 134), but they did so on their own volition because, as he said (S.R. 149):

" 'after all, they were looking for the big hops, nice clusters, because that is what makes weight in their baskets.' "

The court then made this statement:

"There is evidence in the record * * * that selective picking of hops is impractical."

The only evidence in support of that finding is that it would have been more expensive to pick the hops one by one to avoid those which were mildewed. The appellee could have cut down the vines on which the hops were badly infected, and certainly could have picked far more selectively than to "just skip those that were real badly infected." If the pickers skipped those which were "real badly infected," they could just as easily have skipped in addition those which were infected at all.

If this is true, it must be clear that the hops would not "in normal course," or inevitably, show "such mildew" when picked and baled.

From this it follows that selective picking was not impossible nor impractical, as this is the only conclusion which can be drawn from the appellee's testimony to which reference was made in the quotation from the appellant's brief, page 8.

The appellant therefore had a clear right to assume that the appellee could and would take such precautions

as were necessary to make certain that the baled hops would meet the contract specifications.

From time immemorial growers have had to assume the risk of crop failures (Geschwill brief, 26). It is equally true that a manufacturer or producer who undertakes to meet certain contract specifications, assumes the risk of a possible failure to do so (Geschwill brief, 41 to 45).

2.

> "We feel that the finding of the trial court that appellant did not rely on any warranty that the hop crop would be in any different condition than it actually was when delivered is a more reasonable and logical explanation of the intention of the parties."

This finding is based entirely on speculation as there is no evidence to support it. These parties entered into a contract by which the appellant agreed to buy all baled hops from the appellee which were grown on his land and which, when baled, would meet certain contract specifications. This contract was neither impossible nor impractical to perform and the appellant had the undoubted right to assume and did assume that it could and would be performed.

Furthermore, it is well settled that the execution of a contract containing a warranty by the other party constitutes a reliance upon that warranty. 4 Williston on Contracts, Section 972. See Geschwill reply brief, page 8.

One important factor was not taken into account by the court: the appellant was given the right in the contract to reject all baled hops which did not meet the description stated therein. This clause is a strong expression of intention that the appellant could and would reject the appellee's hops if they did not meet the description. Accordingly, this clause was a distinct warning to the appellee that his hops would be rejected if they were not of contract quality. As such, this clause constitutes the clearest evidence of intention, when the contract was signed, that the appellant relied upon the warranty.

3.

> " * * * the making of the picking advance under such circumstances is evidence having some weight that appellant received the quality of hops it bargained for."

This statement was made by the court while discussing the case of *S. S. Steiner, Inc. v. Hill,* 52 Or. Adv. 57, 226 Pac. 2d 307, decided on Jan. 17, 1951, and the question of waiver.

The advance was made by the appellant to enable the appellee to harvest his hops and dry, cure and bale them. As previously stated, the appellant had the undoubted right to assume that the appellee would comply with the terms of the contract and would harvest, dry, cure and bale hops, and only those, which would meet the contract specifications. It was neither impossible nor impractical for the appellee to do so.

How can it possibly be said that the making of the

advance was evidence that "appellant received the quality of hops it bargained for?" When the advance was made the appellant did not know which hops would be picked.

Actually, 50% of the hops in the appellee's yard were infected by mildew and 50% were free of it. The appellee picked 75% of the hops. If he had been even more heedless than he was and picked 100% of his hops, could it still be said that the making of the advance was evidence that "appellant received the quality of hops it bargained for?"

The making of the advance occurred first and could not possibly be evidence of what took place later.

This case was tried by both parties in exactly the same manner as the Geschwill case and all that is said in the brief supporting the petition for rehearing in that case, under this heading, is applicable here and is incorporated herein. The conclusion which is established by that argument is that the hops tendered to the appellant by the appellee Smith did not meet the description in the contract, and that there is no evidence that they did.

The *Steiner* case establishes conclusively that there was no waiver of the quality provisions of the contract in the present case by reason of the execution of the contract or the making of the advance.

While it is true that the trial court made no express finding of waiver in the present case, some of the findings of fact do convey the idea that the trial court had

the concept of waiver in mind and may have been influenced by it.

Waiver and estoppel are considered in some detail in the Geschwill reply brief, pages 10 to 12. This argument was incorporated into the Smith reply brief, page 8. This argument was made in answer to contentions of the appellee that the doctrine of waiver and estoppel were applicable here.

II.
MEASURE OF DAMAGES

The court erred in deciding that the respondent is entitled to maintain this action for the price of the hops under the provisions of Section 64(2) of the Uniform Sales Act, Section 71-164(2), O.C.L.A.

The court held that the appellee was entitled to maintain this action for the price of the hops, and refused to sustain the appellant's contention that the only recovery permitted by the Uniform Sales Act was the difference between the contract price and the market value.

The court gave this reason for its decision:

> "Our view is that the measure of damages applied by the trial court was proper.[5] * * * 5. See discussion of this issue in Loewi, Inc. v. Geschwill, No. 12,440, decided this day."

The decision of the court in the Smith case is clearly erroneous, if the decision of the court in the Geschwill

case on the measure of damages is acknowledged to be correct, as the court in the Smith case failed to take into account one feature of the greatest importance which distinguishes these two cases:

In the Geschwill case, the appellee resold his hops, and gave the appellant credit for the amount received on the resale.

In the Smith case, the appellee did not resell his hops and of course gave the appellant no credit of that kind.

The importance of this distinction lies in this:

The court, in its opinion in the Geschwill case, adopted as the measure of damages in that action, the difference between the contract price and the amount received on the resale of the hops.

In doing so, the court stated that this recovery was justified under Section 64(2) of the Act, Section 71-164(2), O.C.L.A. The court held that the difference between the contract price and the amount received on the resale, was "the loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract," within the meaning of Section 64(2) of the Act.

In this Smith case, however, there was no resale of the hops prior to the trial, and of course there is no record of any resale thereafter.

So far as this record shows, however, there may have been a resale and the appellee may have received a substantial sum for his hops, for which no credit can be

given to the appellant. This is pointed out to demonstrate that the measure of damages adopted by the court in the Geschwill case is wholly inappropriate here, as there is no evidence here with respect to one of the chief elements of the measure of damages adopted by the court in the Geschwill case: the amount received on the resale, if there was such a sale.

In this Smith case, there is no possible basis for permitting a recovery under Section 64(2) of the Act, due to the fact that there has been no resale of which the court has been apprised, nor any evidence that the appellee's hops were worthless at any time.

The case of *Stevenson v. Puget Sound Vegetable Growers' Assn.,* 172 Wash. 196, 19 P. 2d 925, can have no possible application to the present case, as the evidence in that case demonstrated conclusively that the peas which were the subject of the contract, died on the vine and became wholly valueless. In the present case there is no such evidence.

There is, in fact, a complete absence of evidence of the condition or value of the plaintiff's hops at any time after 1947. Nor is there any evidence of what disposition was made of them, or what was received for them if they were resold.

There is therefore a complete failure of proof with respect to one of the elements of the measure of damages adopted by the court in the Geschwill case. We know the contract price, but there is no means of determining from the evidence whether any amount should

be deducted from that price, and if so, what amount must be deducted.

Stating this proposition in another way, there is no evidence in this record tending to establish that the contract price, without deduction, was "the loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract," within the meaning of Section 64(2) of the Act.

This is therefore an action for the price pure and simple and the only portion of the Act which can have any application whatever is Section 63.

There can be no recovery of the price under Section 63(3) because of the considerations set forth in the original Geschwill brief, pages 47 and 48, which were incorporated into the original Smith brief, page 40.

Nor can there be any recovery of the price under Section 63(1) for the reasons set forth in the original Geschwill brief, pages 48 to 61, which were incorporated into the original Smith brief, pages 40 to 42.

We wish to stress the rule that there can be a recovery of the price only when authorized by Section 63 of the Act. This is established by the three cases cited on pages 46 and 47 of the Geschwill brief which were incorporated into the Smith brief, at page 39.

Here Section 63 does not authorize a recovery of the price for the reasons which have been fully discussed in the previous briefs at the pages mentioned.

III.
LIQUIDATED DAMAGES

The court erred in refusing to apply the measure of damages specified in the contract.

In rendering its decision the court simply said:

> "The contract in the instant case contained the same 'liquidated damages' clause as the case of Loewi, Inc. v. Geschwill, decided this day. What we said in that case is equally applicable here."

The appellant accordingly incorporates herein the argument set forth under this heading in the brief filed in the Geschwill case in support of the petition for rehearing filed contemporaneously herewith.

CONCLUSION

The appellant respectfully contends that there is clear error in the decision of the court in the three particulars considered herein, and requests a rehearing in order that this can be demonstrated beyond doubt.

Respectfully submitted,

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